United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original affidavit of mailing

75-1267

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To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1267

UNITED STATES OF AMERICA,
Appellant,

—against—

GERARD P. TROTTA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney.
Of Counsel.

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Preliminary Statement

The United States appeals from an order of the United States District Court for the Eastern District of New York, Neaher, *J.*, dismissing a two-count indictment which charged the defendant with interfering with interstate commerce by demanding and obtaining political contributions from a partnership of consulting engineers in violation of the Hobbs Act, 18 U.S.C. 1951. The district court held that the indictment failed to allege sufficient facts to state a violation of Section 1951.

Statement of Facts

1. On October 31, 1974, a grand jury empanelled in the Eastern District of New York returned a second superseding indictment (A. 3) charging the defendant Gerard P. Trotta, who was the Commissioner of Public Works of the Town of Oyster Bay, Long Island, with the extorting

of political contributions from William F. Cosulich Associates, a firm of consulting engineers. The indictment described William F. Cosulich Associates, as a partnership, engaged in providing services for public bodies and agencies in New York State, including the Town of Oyster Bay, and other states. The nature of the work necessarily involved William F. Cosulich Associates in interstate commerce and the purchase and sale of goods and services in interstate commerce (A. 4-6).

The appellee's powers of office were described by the indictment in detail (CA. 3-4): he was authorized to "retain and employ private engineers, architects and consultants, or firms practicing such professions" in connection with public works projects. As a result, the appellee was reasonably understood by the engineering firm to

> "have the power to take action which could adversely affect William F. Cosulich in obtaining and performing contracts with the Town of Oyster Bay, Long Island."

Each of the two counts in the indictment then alleged that the appellee violated the Hobbs Act by "knowingly and willfully demanding and obtaining from William F. Cosulich Associates" a specified sum of money on or about specific dates (different in each count),

> "for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant Gerard P. Trotta under color of official right."

2. The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any

article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $19,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * * * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The indictment here, of course, charged the defendant with violating that portion of the Hobbs Act which makes it an offense to obtain property from another with his consent induced "under color of official right." This portion of the Hobbs Act essentially codifies the offense as it was known at common law. The essence of that offense is the abuse of public office for private gain; for it was well understood at common law, and by Congress, that a demand for monies made by one holding a public office, from a citizen who could be affected directly and adversely by the manner in which the public officer exercised his official functions, is inherently coercive. Thus, as the Court of Appeals observed in *United States* v. *Sutter*, 160 F.2d 754, 756, "[i]n the common law offense of extortion, color of public office took the place of the force, threats or pressure implied in the ordinary meaning and understanding of the word extortion." Accord: *United States* v. *Kenney*, 462 F.2d 1205, 1229 (C.A. 3), *certiorari denied*, 409 U.S. 914 (1972). It is "the office which provide[s] the duress which render[s] the acceptance of money by [a public official] extortion under color of official right." *United States* v. *Staszuk*, 502 F.2d 875, 883 (C.A. 7, 1974), concurring op. of Campbell, J., *rev'd in part on other grounds en banc*, Slip. Op. No. 73-1869 (May 16, 1975); *United States* v. *Kuta*, — F.2d — (C.A. 7, 1975). Moreover, although in

this case, the monies were obtained for the Republican Committee of the Town of Oyster Bay, and did not go into the defendant's pocket, it is settled law that it is immaterial whether the property is paid directly to the extortioner or a third party. *United States* v. *Green*, 350 U.S. 415 (1956); *United States* v. *Sweeney*, 262 F.2d 273 (C.A. 3); *United States* v. *Provenzano*, 334 F.2d 678 (C.A. 3, 1964), *certiorari denied*, 379 U.S. 947 (1964); *United States* v. *Jacobs*, 451 F.2d 530 (C.A. 5, 1971), *certiorari denied*, 405 U.S. 955 (1972).

3. On November 22, 1974, the defendant moved to dismiss the indictment on the ground that it was vague because it "does not state the specific act or acts or conduct that Mr. Trotta is alleged to have performed * * * in violation of Title 18 U.S. Code Section 1951." Although the defendant conceded that the indictment alleged that "the defendant demanded and obtained from William F. Cosulich Associates sums of money for the benefit of the Republican Committee of the Town of Oyster Bay, the payment having been induced by the defendant "under the color of official right", the defendant argued that the term "under color of official right" was not self-defining and did not inform him of "what acts he is accused of doing" (A. 16).

The defendant also argued that the indictment failed to charge an offense under the Hobbs Act, and that if this indictment were upheld on the theory suggested by the United States, sanction would be given to "a form of criminality that was never envisioned under the Hobbs Act" (A. 20). The defendant suggested, in effect, that, even if the allegations of the indictment were true, his conduct was not unlawful because he was soliciting and demanding monies not for himself but for the Republican Committee of the Town of Oyster Bay. Accordingly defendant argued, if his conduct here is held to be unlawful, the holding would "have a startling and chilling effect on

the entire political process" (A. 22) and it "would not be long before public officials would be in fear of lending their hand to any cause whether it be the Red Cross, The March of Dimes or the political party of their choice" (A. 22).

This argument was made in the face of a representation by the United States that, at a trial, evidence would be introduced showing, *inter alia*, that the defendant, who was lacking totally in the technical qualifications necessary to perform the duties of the public office he held, was appointed to it solely on the recommendation of the Republican Committee of the Town of Oyster Bay; that on assuming his position, he sought to repay that body for the appointment by demanding political contributions from a business which seeking to obtain contracts from the Town of Oyster Bay; that the defendant advised the aforesaid business, William F. Cosulich Associates, that in effect his public office had been dedicated to raising funds for the Republican Party of Oyster Bay; and that, because the defendant "had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island" (Ind. ¶ 3), it made contributions which it otherwise would not have made but for the wrongful use of the defendant's public office (A. 40).

4. The district court granted the motion to dismiss the indictment, apparently (although it is not entirely clear), adopting the alternative ground for dismissal urged by the defendant. The district court judge quite plainly rejected the argument that the term "under color of official right" was "vague" (A. 117-118):

> "Since the days of Blackstone, extortion under color of office has been uniformly recognized as the unlawful taking by a public official of money not due either to the office or the official."

The indictment, however, was held to be deficient for three separate but related reasons. The district court first held that the indictment failed to charge a key essential element—"action or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand" (A. 116). Second, the district court stated that demand for political contributions by a public official, under the circumstances, is not extortion unless the indictment alleges that the official's conduct manifests a "corrupt use" of his public office (A. 117). Finally, the district court held that the indictment failed to allege acts or words by the appellee that fit within the district court's view of the statutory definition of extortion; under this definition, the words "wrongful use" must be read together with "under color of official right" (A. 118).

These assumptions are without merit. We submit that the indictment need not allege action or words by the public official that induce a compulsion in the victim to submit to the demand for money: the coercive impetus is provided by the public position held by the appellee and the inherent ability of the appellee to economically damage the victim. Second, the "corrupt use" of the official position, which the district court failed to discern, is the use of the coercion inherent in the position to obtain monies, whether for himself or a political party, which was not lawfully due him or his office. Finally, the district court's reading of the statute is erroneous; the phrasing of the statutory definition of extortion is clearly in the disjunctive—to define extortion as the obtaining of property "induced by wrongful use under color of official right" is both grammatically and substantively unintelligible.

We proceed to a broader discussion of these points.

ARGUMENT

The district court erred in dismissing the indictment.

1. The district court initially recognized—quite correctly—that the offense of extortion "under color of official right" is separate and distinct from coercive extortion whereby property is obtained "by wrongful use of actual or threatened force, violence or fear" (A. 113):

> "* * * Instead, the 'office held by the official provides the coercive impetus which generates the payment.' More generally, it has been held that this portion of the Hobbs Act states an offense equivalent to the common law crime of extortion, a crime that originally only a public official could commit."

See United States v. *Braasch*, 505 F.2d 139, 151 and n. 8 (C.A., 7, 1974), *certiorari denied*, —U.S.— (1975); *United States* v. *Staszcuk*, 502 F.2d 875, 877-78, 883 (C.A., 7, 1974), *rev'd in part on other grounds en banc*, Slip Op. *United States* v. *Kenney*, 462 F.2d 1229 (C.A., 3), *certiorari denied*, 409 U.S. 914 (1972). *See also* Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1, 14-16 (1971).

Since the indictment here alleged specific facts showing that the defendant was a public official whose position plainly provided "the coercive impetus" to back up his "demand" for political contributions, it is difficult to comprehend in what manner it is deficient. The principal error in the district court judge's holding to the contrary is his apparent disregard of the very definition of the offense which he initially adopted. Thus he wrote (A. 116):

> "Although the victim's state of mind is always an essential element of the crime of extortion, *United States* v. *Kennedy*, 291 F.2d 457, 458 (2d Cir. 1961), it is not a substitute for the key essen-

> tial element—actions or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand. While, as already noted, p. 5 *supra*, official position is regarded as a coercive substitute for threats of harm, that is not to say that a local public official who demands and obtains a political contribution from a businessman he can adversely affect *ipso facto* violates the Hobbs Act. Such a practice, however questionable and not to be condoned, is not extortion within the meaning of the Act any more than it is under the Penal Law of New York."[1]

The district court's statement, that the state of mind of the victim "is not a substitute for the key essential element—actions or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand", is difficult to follow. If the district court judge means that something more is required than a demand made by a public official, under the circumstances alleged here, *i.e.*, an express threat to cause economic injury, then he is clearly wrong. The Hobbs Act not only contains express language which would cover such a case, but as the district court initially recognized, the offense with which the defendant is charged here is one that requires no threats; it is the office held by the official that provides the "coercive impetus" (A. 116). Indeed, at oral argument, defendant's counsel agreed with the district court's analysis. As he aptly put it (A. 61):

> "If you have a situation such as you say where somebody has an official position and the man knows he has to deal with this person in the official position, therefore he is, he by consent gives the money but implies the reason he is doing it is because he doesn't want to be hurt by the man in the official position.

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[1] Of course, it is irrelevant that the defendant's conduct would not constitute extortion under "the Penal Law of New York" (A. 116). The defendant is not charged with violating Section 155.05 (2) of the Penal Law.

> What you have there is an implied use of fear because what is being done is that the person who has the official position in which he can cut you off out of business, can sell your contracts or not, give you contracts, he's inducing the consent by the use of fear. He's not fooling.[2]

Particularly apposite is *United States* v. *Kuta*, — F.2d — (C.A. 7, June 30, 1975), No. 74-1920). There the evidence showed that (Slip. Op., p. 3):

> "* * * [One] Vanchieri believed that the alderman of the ward must approve zoning changes. In an attempt to have property that he owned in the twenty-third ward rezoned. Vanchieri contacted the defendant. At this initial meeting, Kuta told Vanchieri that he had no objection to the proposed zoning change. Nothing more was said. Vanchieri then filed an application for a zoning change, and on November 17, 1969 the requested amendment was passed by the full City Council, alderman Kuta voting in favor of the amendment.
>
> On December 1, 1969 the defendant telephoned Vanchieri and asked to see him. Vanchieri responded that he would be right there. He then put a blank check in his pocket and went to Kuta's office. When he arrived, Vanchieri initiated the conversation by asking how much he owed. He asked that question because, in light of Kuta's telephone call, he 'thought [he] owed him something for not objecting to the zoning.' In response to Vanchieri's question, Kuta replied '$1500.' Vanchieri made out the blank check that he had brought payable to himself, endorsed it, gave it to the defendant, and then left the office."

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[2] The defendant's counsel argued, however, that this came within the provisions of the Hobb's Act making it an offense "by wrongful use of actual or threatened force, violence or fear." Assuming this is so, it is hardly a defense to this indictment if, in fact, the defendant's conduct also came within the definition of extortion "under color of official right." See e.g. *United States* v. *Irali*, 503 F.2d 1295, 1299-1300 (C.A. 7, 1974).

In upholding the judgment of conviction, the court of appeals observed, Slip. Op., p. 4:

> The evidence here is sufficient to show that it was Kuta's office that brought forth Vanchieri's payment, and that therefore the defendant committed extortion. Vanchieri believed that the alderman must approve zoning changes, the approval taking the form of not objecting to the proposed change. In addition to Vanchieri's belief, the record shows that persons contacted the defendant about zoning problems, and a realtor, Irwin Michaels, testified that he discussed payments for zoning changes with the defendant. The jury could conclude from this evidence that as alderman the defendant exercised power over zoning amendments, and that the payment by Vanchieri was made to influence that aldermanic power. *See United States* v. *Staszcuk*, 502 F.2d 874, 878 (7th Cir. 1974), *rev'd in part on other grounds en banc*, Slip op. No. 73-1869 (May 16, 1975).

Thus, although not a word was uttered by the defendant in *United States* v. *Kuta*, *supra*, except the amount of money he desired (and that after he was no longer able to adversely affect the victim), he was properly held to have been guilty of obtaining property "under color of official right" because (1) he had the power to take action which could have adversely affected the payee and (2) the payment was made precisely because he had such power. Accord: *United States* v. *Crowley*, 504 F.2d 992 (C.A. 7, 1974). That is precisely what is alleged to have happened here.

2. Perhaps recognizing the defect in its reasoning, the district court attempted to further justify its conclusion with the following argument (A. 117):

> "* * * Solicitation for a political party are not part of any official duty. Whatever one may think of the ethics of the practice, a local public official's solicita-

> tion or receipt of political contributions is neither unlawful nor extortionate unless a *corrupt use* of the public office is manifest. See *United States* v. *Sutter*, 160 F.2d 754 (7th Cir. 1947). See also N.Y. Penal Law § 200, *et seq.* (McKinney 1975)."

This argument is likewise difficult to follow. Of course solicitations—in this case "demands"—for a political contribution "are not part of [the defendant's] official duty" that is precisely the point. Because they are not, the defendant has no right to use the coercion inherent in his office to make the demand. Moreover, the very use of his office in this manner is a "corrupt use".[3] As Mr. Justice Clark wrote in *United States* v. *Braasch*, 505 F.2d 139, 151 (C.A. 7, 1974), *certiorari denied*, — U.S. — (1975):

> "The use of office to obtain payments is the crux of the statutory requirement of 'under color of official right' * * *. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. 1951."

United States v. *Sutter*, 160 F.2d 754 (C.A. 7, 1947) upon which the district court relied, stands for a proposition supporting our position and flatly contradicts the holding of the district court. The statute at issue there at issue, now 18 U.S.C. 872 (former Section 171), did not define the offense of extortion as it is defined in the Hobbs Act, that is it did not adopt the common law definition. As the Court of Appeals for the Seventh Circuit observed in *United States* v. *Sutter*, 160 F.2d 754, 756 (C.A. 7, 1947):

> "Congress did not see fit to define extortion in the terms known to the common law. It said that if an employee under color of his office is *guilty of extor-*

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[3] If the issue is the facial validity of the indictment, then the allegations are plainly sufficient, for as the district court recognized, the term "under color of official right" is simply a technical expression implying bad faith, corruption or breach of duty" (A. 118).

tion, he shall be punished. Therefore, extortion is used in its common, ordinary sense as distinguished from the sense in which it was known at common law."

The court appeals continued (*Id.*):

> "If the statute in question had defined extortion as it was known at common law, it should have been sufficient if it had provided [as the Hobbs Act does]: 'An employee of the United States who under the color of his office receives money or anything of value to which he is not entitled shall be guilty of extortion.' In the common law offense of extortion, color of public office took the place of the force, threats, or pressure implied in the ordinary meaning and understanding of the word extortion. The instant statute requires more. It does more than substitute color of office for fear, threats, or pressure. The use of official position must be coupled with extortion. Under this statute, a Federal employee is guilty only if he uses his office to place another under compulsion of fear, force or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily. It is the oppressive use of official position that is the essence of this offense. Official acts must be committed which cause another to act by reason of the pressure therefrom and not of his own volition."

The present case, of course, involves a statute which codifies the common law definition of extortion, *United States* v. *Kenney, supra.* Moreover, unlike *United States* v. *Sutter*, where the judgment of conviction was reversed, the "contributor" here will not testify that he contributed freely and voluntarily; on the contrary, its members will testify that they agreed to the contribution solely because it was demanded by a public official who "had and was reasonably understood * * * to have the

power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contract with the Town of Oyster Bay, Long Island.[3]

3. The final peg upon which the district court based its holding is that (A. 118):

> "The instant indictment contains on its face no allegation of acts or words by defendant which could reasonably be construed to satisfy the elements of 'extortion . . . under color of official right' within the meaning of the Hobbs Act. The words 'wrongful use of' in the statutory definition, § 1951(b)(2), must be read in conjunction with 'under color of official right' as they are in the case of 'actual or threatened force, violence, or fear'; otherwise innocent action by a public official could assume criminal coloration under the Act simply by virtue of his office."

This argument too is erroneous. Section 1951(b)(1) provides:

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

It is obvious in context that the term "wrongful use" applies only to "actual or threatened froce, violence or fear", and indeed, unless it is so read, it makes no sense, for, under the district court's interpretation, the offense would be to obtain funds from a victim whose consent was induced "by wrongful use under color of offiical right."

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[3] This is, of course, a complete answer to the district court's argument that the indictment here is deficient because it would not state an offense under 18 U.S.C., 872 (the statute at issue in *United States* v. *Sutter*). Indeed, the district court seemed more concerned with statutes which the defendant was not accused of violating than with the statute he was accused of violating. See, *supra,* n. 2.

Moreover, the Supreme Court has held that the word wrongful "has meaning in the Act only if it limits the statutes' coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionists has no lawful claim to the property." *United States* v. *Emmons*, 410 U.S. 396, 400 (1972); but the very predicate of extortion under color of official right is that the public official has no lawful claim to the property.

Finally, there is no possibility that "otherwise innocent action [by a public official] could assume criminal coloration under the Act by virtue of his office." The indictment charges that the defendant here acted knowingly and wilfully, that is he obtained the contributions here at issue with knowledge that the consent for the payment was induced by the power inherent in his office to adversely affect the payor. Moreover, if the defendant did not know that persons from whom he demanded political contributions were in a position to be adversely affected by the manner in which he exercised the powers of his office or that they reasonably believed that he had such power, then he would clearly have a defense to the indictment.

CONCLUSION

We respectfully submit that, for the reasons stated above, the district court, plainly erred in dismissing the indictment and ask that the order of the district court should be reversed and the indictment be reinstated.

Respectfully submitted,

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Of Counsel.

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* We wish to acknowledge the assistance of Gregory J. Wallance, a third year law student at Brooklyn Law School, in the preparation of this brief.

AFFIDAVIT OF MAILING

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Evelyn Cohen

Sworn to before me this
21st day of Aug. 1975

Olga S. Morgan

OLGA S. MORGAN
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